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No. 04-1239

In the Supreme Court of the United States

JAIME CARDENAS-GARCIA AND JAHAN RASTY,
Petitioners,

v.

TEXAS TECH UNIVERSITY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because it does not present an important question of federal law over which the courts of appeals conflict. The courts of appeals have reached a near-consensus regarding the standard for "adverse employment actions" in Title VII retaliation claims, with ten of the twelve circuits requiring that any such action be "material," "serious and tangible," or "significant." And while the Fifth Circuit's "ultimate employment decision" test is worded somewhat differently from the majority rule, the Solicitor General has observed that "it is unclear that there is any real difference in practice" between the two standards. Indeed, a review of case law from other circuits shows that it is far from certain that Petitioners would have viable claims in those jurisdictions under the specific facts of this case.

Underscoring the insignificance of this conflict, the Court has already denied review on this question once during this Term. And just last Term, the Court declined to review three Fifth Circuit cases applying the same "ultimate employment decision" standard that Petitioners challenge here. Nothing about the Fifth Circuit's unpublished, non-precedential decision in this case warrants a sudden change in course. Consistent with its recent dispositions of petitions raising this issue, the Court should deny review.

Petitioners' second question raises a false conflict between Fifth and Eleventh Circuit precedent regarding whether disproportionate pay raises present actionable discrimination claims under Title VII. Precedent from both courts states that denials of "significant" raises are actionable. To the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in discrimination cases, it is at most a misapplication of circuit precedent that does not warrant review.

Finally, this case is inappropriate for the Court's review because numerous alternative grounds for affirmance exist that would require the Court to engage in a cumbersome, case-specific analysis

of Respondents' various defenses. Accordingly, the Court should deny the petition.

STATEMENT OF THE CASE

1. Respondents incorporate by reference the factual background set forth in the district court's January 20, 2004 Order. Pet. App. 15a-30a.

2. In December 2002, Petitioners filed suit against Texas Tech University ("TTU") alleging national origin discrimination and retaliation in violation of Title VII and violation of due process pursuant to 42 U.S.C. §1983. R1-19. In June 2003, Petitioners amended their complaint to add: (1) Respondents Thomas Burton and William Marcy as named defendants; (2) a claim of harassment under Title VII against TTU; and (3) claims of national-origin discrimination, retaliation, and harassment under 42 U.S.C. §§1981 and 1983 against all Respondents. R93-122. The district court subsequently granted TTU's partial motion to dismiss Petitioners' claims for monetary damages against TTU under §§1981 and 1983 as barred by Eleventh Amendment immunity. R191-97.

In October 2003, Respondents Burton and Marcy filed a motion for summary judgment. R287. On January 20, 2004, the district court granted this motion, dismissing all of Petitioners' claims against Burton and Marcy on numerous independent, alternative grounds. Pet. App. 14a-69a.

First, with respect to Cardenas-Garcia's discrimination and retaliation claims based on his annual performance review, the district court held that: (1) Cardenas-Garcia had not established the "adverse employment action" element of a prima facie case for either claim because the review was not an "ultimate employment decision"; (2) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the review—Cardenas-Garcia's poor work performance—and there was no genuine issue of material fact that the reason was pretextual; and

(3) as an alternative ground on the discrimination claim, the evidence did not show that Cardenas-Garcia was reviewed differently than someone in similar circumstances because the professor with whom he compared reviews had other accomplishments that justified the better review. Pet. App. 52a-53a.

With respect to Rasty's discrimination and retaliation claims based on the investigation of academic-dishonesty charges against him, the district court held that: (1) Rasty had not established the "adverse employment action" element of a prima facie case for either claim because the investigation—which found inaccuracies in Rasty's publication record, but not sanctionable "academic misconduct"—did not result in an "ultimate employment decision"; (2) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the investigation—inaccurate statements regarding Rasty's publications—and there was no genuine issue of material fact that the reason was pretextual; (3) as an alternative ground on the discrimination claim, the evidence did not show that Rasty was investigated differently than someone in similar circumstances because the professor with whom he compared himself had admitted and corrected mistakes in his academic record, thereby obviating the need for an investigation; and (4) as an alternative ground for the retaliation claim, Rasty had not established the causation element of a prima facie case because he offered only conclusory statements of retaliatory motive. Pet. App. 59a-61a.

And with respect to Petitioners' discrimination and retaliation claims that they received proportionately lower pay raises than some of their Anglo-American colleagues, the district court held that: (1) claims predicated on many of the raises were barred by the statute of limitations; (2) alternatively, Petitioners had not established the "adverse employment action" element of a prima facie case for either claim because the variations in pay raises did

not qualify as "ultimate employment decisions"; and (3) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the raise amounts—they were justified by differences in performance—and there was no genuine issue of material fact that the reason was pretextual. Pet. App. 51a, 53a-54a, 65a-66a.

Finally, as to all of Petitioners' claims, the district court held that Burton and Marcy were entitled to qualified immunity. Specifically, the court held that Petitioners had failed to show violation of a clearly established right and, alternatively, they had not shown that Burton's and Marcy's actions were objectively unreasonable. Pet. App. 56a-57a, 66a-67a.

In December 2003, TTU filed its motion for summary judgment. R956. On January 22, 2004, the district court granted TTU's motion, dismissing all of Petitioners' claims against TTU for essentially the same reasons provided in the Order granting Burton and Marcy's summary-judgment motion. Pet. App. 4a-13a. The district court entered final judgment for all Respondents on January 22, 2004. R1681.

3. In an unpublished, per curiam opinion, the court of appeals affirmed the district court's judgment. Pet. App. 1a-3a. The court of appeals held that Cardenas-Garcia's annual review and the investigation into charges of academic dishonesty against Rasty did not satisfy the "adverse employment action" element of a prima facie case because they were not ultimate employment decisions. Pet. App. 2a. With respect to Petitioners' claims based on lower pay raises, the court of appeals reviewed its jurisprudence and observed "we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the [adverse employment action] requirement." Pet. App. 3a.

REASONS TO DENY THE PETITION

I. THE QUESTION REGARDING WHAT CONDUCT QUALIFIES AS AN "ADVERSE EMPLOYMENT ACTION" IN A TITLE VII RETALIATION CLAIM DOES NOT WARRANT REVIEW.

A. Petitioners Overstate the Extent of the Conflict.

Petitioners overstate the extent of the circuits' disagreement regarding what constitutes an "adverse employment action" sufficient to state a prima facie case of retaliation under Title VII. In fact, the circuits have now reached near-unanimity on the standard for such actions.

1. Ten of the twelve circuits currently require a plaintiff to show that he suffered a retaliatory action that meets a threshold of materiality or significance. The First, Second, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits use the term "material."[1] The Third and Eleventh Circuits apply essentially the

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1. *Gu v. Boston Police Dep't*, 312 F.3d 6, 14 (CA1 2002) (holding that "[t]o be adverse, an action must materially change the conditions of plaintiffs' employ"); *Fairbrother v. Morrison*, No. 03-9242-CV, 2005 WL 1389894, at *13 (CA2 June 14, 2005) (explaining that "[a]n adverse employment action is a 'materially adverse change' in the terms and conditions of employment" (citations and internal quotations omitted)); *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 797, 800 (CA6 2004) (en banc) (reaffirming circuit standard that plaintiff must show "a materially adverse change in the terms of her employment" (citations and internal quotations omitted)); *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307, at *6 (CA7 June 15, 2005) (requiring retaliation plaintiff to show that "he suffered a materially adverse employment action"); *Bradley v. Widnall*, 232 F.3d 626, 632 (CA8 2000) (holding that "[a]n adverse employment action is exhibited by a *material* employment disadvantage" (emphasis in original)); *Duncan v. Manager, Dep't of Safety*, 397 F.3d 1300, 1314 (CA10 2005) (noting that "[a]n adverse employment action must be materially adverse to the

same standard using different language, requiring the adverse action to be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment."[2] And while the Fourth Circuit ostensibly demands only a showing that the employer's actions "adversely affected 'the terms, conditions, or benefits' of the plaintiff's employment," *Von Gunten v. Maryland*, 243 F.3d 858, 865 (CA4 2001), in practice it has rejected actions it did not deem "significant," *id.*, at 868 (finding poor performance reviews and change in job assignments were not adverse actions because court could not discern "any significant difference" between earlier performance review and challenged review and change in job assignment was not "truly . . . significant").[3] Reviewing these various standards, the Eleventh Circuit has concluded that, regardless of the language used, "[a]s

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employee's job status" (citation and internal quotations omitted)); *Forkkio v. Powell*, 306 F.3d 1127, 1131 (CADC 2002) (describing circuit standard that "an employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities").

2. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (CA3 1997); *Stavropoulos v. Firestone*, 361 F.3d 610, 617 (CA11 2004) (citation and internal quotations omitted), *cert. denied*, 125 S. Ct. 1850 (2005).

3. *See also Brackman v. Fauquier County*, 72 Fed. Appx. 887, 893 (CA4 2003) (per curiam) (holding that plaintiff did not show adverse employment action because "we fail to see how [the challenged action] had a 'significant detrimental effect' on [the plaintiff]") (citation omitted); *Becker v. Gannett Satellite Info. Network, Inc.*, 10 Fed. Appx. 135, 140 (CA4 2001) (per curiam) (holding that plaintiff did not show adverse employment action where employer "did not significantly alter her job responsibilities in any detrimental or significant way").

applied, these standards are essentially interchangeable." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (CA11 2001).

The Fifth Circuit has articulated a different threshold, requiring the employee to show that he suffered an "ultimate employment decision," which "include[s] acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (CA5 1997) (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (CA5 1995)). Elaborating on this standard, the court has explained that "[a]n employer's action does not rise to the level of an 'adverse employment action' when it fails to have more than 'mere tangential effect on a possible future ultimate employment decision.'" *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (CA5 2001) (quoting *Walker v. Thompson*, 214 F.3d 615, 629 (CA5 2000)). Accordingly, the Fifth Circuit standard is largely the same as the standard predominant among other circuits, differing only in the margin between "material" or "serious" employment actions and actions that concern or have more than a tangential effect on hiring, granting leave, discharging, promotions, and compensation.

Finally, the Ninth Circuit alone adopts a broader interpretation of what constitutes an adverse employment action. In *Ray v. Henderson*, 217 F.3d 1234, 1243 (CA9 2000), it held that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."

2. Petitioners incorrectly describe the circuits' standards as more divergent by relying on the Ninth Circuit's erroneous and dated assessment of circuit law in *Ray*. Pet. 15. In that case, the court claimed that its "expansive view" of actionable adverse employment actions was shared by the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits. *Ray*, 217 F.3d, at 1241-42; *see also* Pet. 15. But, as previously discussed, all of these courts now require a showing of "material" or "serious and

tangible" actions to establish a prima facie case of retaliation. *See supra* nn.1, 2.

Moreover, an examination of the cases relied on by the Ninth Circuit further demonstrates why *Ray*'s description of the state of circuit law on this issue in 2000 is either outdated or simply wrong. In *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (CA1 1994) (per curiam), the First Circuit stated in dicta that, apart from discharge, "other adverse actions" covered by Title VII include, *inter alia*, "disadvantageous transfers or assignments" and "toleration of harassment." But eight years later, notwithstanding *Wyatt*'s dicta, the First Circuit specifically rejected a retaliation claim based on disadvantageous transfer and toleration of harassment on the ground that those particular actions in that case did not satisfy the Court's "materially adverse" standard. *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 22-27 (CA1 2002).

Similarly, in *Knox v. State*, 93 F.3d 1327, 1334 (CA7 1996), the Seventh Circuit stated in dicta that there is "nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee." But in the nine years since *Knox* was decided, the court has decidedly distanced itself from this dicta, embracing the much stricter "materially adverse" standard. *Beamon*, 2005 WL 1399307, at *6; *see also Markel v. Bd. of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 911 (CA7 2002) (holding plaintiff's claims that she was "denied 'better' equipment, the ability to travel and make presentations, and removed from certain accounts that caused her not to receive bonuses" were not material, and thus, not actionable); *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 729 (CA7 2001) (holding that "unfair reprimands or negative performance evaluations, unaccompanied by some tangible job consequence, do not constitute adverse employment actions").[4]

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4. Like the Ninth Circuit, Petitioners also misplace reliance on the *Wyatt* and *Knox* dicta to describe—incorrectly—the current state of

The Tenth Circuit cases cited in *Ray* do not align that court with the Ninth Circuit's broad definition of adverse employment actions. In *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (CA10 1996), the plaintiff was actually denied severance benefits—a compensation decision that would be actionable in any circuit. And, although the Tenth Circuit held in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996), that a criminal prosecution could constitute an adverse employment action because of its impact on future hiring, the court has since effectively limited *Berry* to its facts by declining to extend it to other situations not deemed materially adverse. *See, e.g.*, *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1269 (CA10 2005) (declining to extend *Berry* to filing of police report against employee); *Dirusso v. Aspen Sch. Dist. No. 1*, 123 Fed. Appx. 826, 839 (CA10 2004) (declining to extend *Berry* to negative job reference given to future employer); *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934 (CA10 2001) (declining to extend *Berry* to removal of plaintiff from committee, notwithstanding impact on future employment). Finally, as discussed previously, the Tenth Circuit now requires a "materially adverse" employment action to state a prima facie case of retaliation. *Duncan*, 397 F.3d, at 1314.

The Ninth Circuit simply misread the Eleventh Circuit's decision in *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (CA11 1998). In *Ray*, the Ninth Circuit described *Wideman* as holding that actionable adverse employment actions "include" matters such as "requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment." *Ray*, 217 F.3d, at 1241-42 (citing *Wideman*, 141 F.3d, at 1456). In fact, the Eleventh

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circuit law on this issue. Pet. 17.

Circuit held that these actions "*considered collectively* are sufficient to constitute prohibited discrimination" under Title VII's anti-retaliation provision. 141 F.3d, at 1456 (emphasis added). The court specifically declined to decide "whether anything less than the totality of the alleged reprisals would be sufficient." *Id.*

Finally, in *Passer v. American Chemical Society*, 935 F.2d 322, 330-31 (CADC 1991), the District of Columbia Circuit held that an adverse employment action could include an act that affected future employment prospects. But that court has since specified that any such effect must be a "materially adverse consequence[]." *Forkkio*, 306 F.3d, at 1131.[5]

Indeed, Petitioners' own authority acknowledges that the "emerging trend" among the circuits is a movement toward the more restrictive "materially adverse" standard. *See* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 636 & n.29 (2003). Thus, contrary to Petitioners' assertion that this conflict is "intractable" and "entrenched," this trend suggests that circuit law is evolving toward a consensus, and, therefore, does not warrant review by the Court.

3. In sum, the conflict raised by Petitioners is extremely lopsided, with all almost all circuits requiring that an adverse

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5. The Ninth Circuit also erroneously aligned the Eighth Circuit with the Fifth Circuit as using the "ultimate employment decision" standard. *Ray*, 217 F.3d, at 1242. Although the Eighth Circuit has used those words to describe actionable conduct, it has defined that phrase to include any "tangible change in duties or working conditions that constituted a material employment disadvantage." *Manning v. Metro. Life. Ins. Co.*, 127 F.3d 686, 692 (CA8 1997); *see also Von Gunten*, 243 F.3d, at 864 (recognizing that Eighth Circuit actually uses "material disadvantage" standard rather than "ultimate employment decision" standard).

employment action be "material," "serious and tangible," or "significant" to state a retaliation claim. And the Fifth Circuit's rule ostensibly differs from this standard only in the narrow margin between such "material" employment actions and "ultimate employment decisions" that have more than a tangential effect on hiring, granting leave, discharging, promotions, and compensation.

B. The Difference Between the Fifth Circuit Rule and the Majority Rule Exists More in Principle than in Practice.

The small and somewhat vague distinction between the Fifth Circuit's "ultimate employment decision" standard and the materiality/significance standard used by almost all other circuits does not present an "important" conflict that merits certiorari review. *See* SUP. CT. R. 10. The difference exists more in principle than in practice, as evidenced by Petitioners' failure to show a clear divergence in the application of these standards to the facts of this case.

1. Petitioners rely on the Solicitor General's comment that "[t]he courts of appeals have *articulated* different standards for what types of employment conduct are actionable" under Title VII's anti-retaliation provision. Pet. 17 (quoting Brief for Respondent in Opposition at 7, *Noland v. Henderson*, 532 U.S. 1019 (2001) (mem.) (No. 00-1259) (emphasis added)). But the Solicitor General has since opined that "it is unclear that there is any real difference in practice between the 'ultimate employment decision' standard . . . and the 'adverse employment action' standard" employed by most circuits. Brief for Respondent in Opposition at 5, *Vasquez v. Snow*, 541 U.S. 936 (2004) (mem.) (No. 03-887). In other words, although the circuits may employ different verbal formulations of the standard for evaluating alleged retaliatory actions, application of those standards yields little difference in results.

The Fourth Circuit echoed this assessment in *Von Gunten*, noting that "[s]ometimes the practical differences between these

two standards are difficult to discern" and the distinction results in a "sometime slight real world difference." 243 F.3d, at 864. And although the Fourth Circuit stated that the standards could produce different results if "strictly applied," *id.*, they would not have yielded disparate results in *Von Gunten*. The court rejected the plaintiff's claims that denying her use of a state vehicle, downgrading her annual review, changing her job assignments, mishandling her requests for leave, and failing to deal adequately with her complaints of harassment constituted, either individually or collectively, adverse employment action sufficient to state a retaliation claim. *Id.*, at 867-70.

The "slight real world difference" in these standards largely results from the fact that courts are resolving this issue experientially by deciding particular cases on their peculiar facts. *See White*, 364 F.3d, at 799 (stating that "we have over the last twenty years given some shape to the definition by describing the kinds of material adverse employment actions that rise above the level of trivial"); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (CA11 2000) (holding that "[w]hether an action is sufficient to constitute an adverse employment action for purposes of a retaliation claim must be determined on a case-by-case basis").[6] Even the Fifth Circuit's seemingly more categorical approach can yield varying results depending on the circumstances. For example, although the court held in this case that Petitioners' poor

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6. *See also Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (CA10 1999) (noting that "we take a case-by-case approach in determining whether a given employment action is 'adverse'"); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 49 (CA1 1999) (observing that "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry"); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (CA2 1997) (commenting that "courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse'").

performance reviews did not constitute "ultimate employment decisions," Pet. App. 2a, in another case it assumed that a low performance evaluation was an "ultimate employment decision" where it automatically postponed an annual raise. *See Felton v. Polles*, 315 F.3d 470, 488 (CA5 2002). Consequently, the circuits' different "articulations" of the standard for adverse employment actions are less relevant than how they are applied in a given case.

2. The limited practical effect of these differently phrased standards is reflected in Petitioners' unconvincing attempt to show that the conflict is necessarily outcome-determinative in this case. Pet. 20-22.

Petitioner Cardenas-Garcia alleges a conflict between the Fifth Circuit's decision that one of his annual reviews was not an adverse employment action and cases from four other circuits. Pet. 20-21 (citing *Wyatt v. City of Boston*, 35 F.3d 13, 16 (CA1 1994) (per curiam); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (CA9 1987); *Cardenas v. Massey*, 269 F.3d 251, 263-64 (CA3 2001); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (CA8 1997)). Thus, he asserts that his retaliation claim predicated on his annual review would have been viable in these jurisdictions. Pet. 21.

But the viability of Cardenas-Garcia's retaliation claim is not simply a matter of geography. All of these courts—including the Ninth Circuit—have held under certain circumstances that negative performance reviews did not qualify as adverse employment actions. *See Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (CA1 1998) (holding that critical reports on plaintiff's productivity were not adverse employment actions); *Weston v. Pennsylvania*, 251 F.3d 420, 430-31 (CA3 2001) (holding that written reprimands were not actionable adverse employment actions when plaintiff did not show material change in terms and conditions of employment); *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691-92 (CA8 2001) (holding that performance review was not actionable where plaintiff did not show it resulted

in a material employment disadvantage); *Lyons v. England*, 307 F.3d 1092, 1118 (CA9 2002) (holding that lower evaluation was not actionable where it did not translate into further adverse decision).[7] And, as discussed previously, the Fifth Circuit has suggested that a performance review could be actionable if it directly affected compensation. *See Felton*, 315 F.3d at 488.

These divergent assessments of whether performance reviews present actionable retaliation claims naturally result from the fact-specific inquiry courts conduct to determine whether a particular act is "material" or "reasonably likely to deter employees" or has "more than a mere tangential effect" on future employment decisions. As such, Cardenas-Garcia's claim regarding his annual review—which apparently is based on a single comment that Burton made in his

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7. Indeed, *all* of the other circuits have held likewise. *See, e.g.*, *Fairbrother v. Morrison*, No. 03-9242-CV, 2005 WL 1389894, at *14 (CA2 June 14, 2005) (holding that negative evaluation was not adverse employment action); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 189 (CA4 2004) (holding that negative employment evaluation did not "rise[] to the level of an adverse employment action"); *Primes v. Reno*, 190 F.3d 765, 767 (CA6 1999) (holding that low evaluation was not adverse employment action under circumstances of that case); *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307, at *6 (CA7 June 15, 2005) (observing that "although negative performance evaluations may be evidence of discrimination, they are not alone considered to be actionable adverse employment actions); *Amro v. Boeing Co.*, 232 F.3d 790, 799 (CA10 2000) (holding that lower performance evaluation was not adverse employment action); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1240 (CA11 2001) (holding that negative job performance memoranda did not constitute actionable adverse employment actions); *Brown v. Brody*, 199 F.3d 446, 458 (CADC 1999) (noting that a "thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions").

evaluation, Pet. App. 18a-19a—does not present a clear circuit conflict that merits review.

For the two remaining adverse actions raised by Petitioners (disproportionate pay raises and disciplinary investigations), they can cite only an alleged conflict with two cases from the Ninth Circuit, which alone among the circuits has adopted a broad definition of adverse employment action. Pet. 21-22 (citing *Ray*, 217 F.3d, at 1243-44; *Hashimoto v. Dalton*, 118 F.3d 671, 676 (CA9 1997)). And even then, neither of these cases directly conflicts with the Fifth Circuit's decision below.

In *Ray*, the Ninth Circuit held that a *reduction* in the plaintiff's pay constituted an adverse employment action. 217 F.3d, at 1244. This holding does not conflict with Fifth Circuit precedent generally, which holds that a reduction in pay qualifies as an actionable adverse employment action. *Tyler v. Union Oil Co.*, 304 F.3d 379, 397 (CA5 2002). Nor does *Ray*'s holding regarding pay *reductions* present an actual conflict with this case, in which Petitioners complain that the amount of the pay *raises* they received constitutes an adverse employment action. Pet. App. 54a, 65a-66a.[8]

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8. Even if *Ray* could be broadly read to mean any disproportionate adjustment in pay is actionable, it still does not present a circuit conflict. The Fifth Circuit does not categorically reject retaliation claims predicated on disproportionate pay raises. *Harrington v. Harris*, 118 F.3d 359, 366 (CA5 1997). Indeed, such actions certainly represent "compensation" determinations, which the Fifth Circuit has always considered "ultimate employment decisions." *See Mattern*, 104 F.3d at 707. Accordingly, to the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in retaliation cases, *see* Pet. App. 3a, it is at most a misapplication of circuit precedent that does not warrant review. *See infra* Part II.

In *Hashimoto*, the Ninth Circuit held that a negative job reference could constitute an adverse employment action despite the fact that it "turned out to be inconsequential" because the prospective employer would not have hired the plaintiff even without the negative reference. 118 F.3d, at 676. Rasty claims that *Hashimoto* conflicts with the court of appeals's holding that TTU's investigation into academic-dishonesty charges against him was not an ultimate employment decision. Pet. 21-22. There are several problems with this purported conflict.

As an initial matter, the negative job reference in *Hashimoto* and the academic investigation into Rasty's statements about his publications are so factually dissimilar that a genuine conflict does not exist. Rasty nevertheless tries to present a conflict in rationale, asserting that, in contrast to the job reference in *Hashimoto*, TTU's investigation was held not to be an adverse employment action because it cleared Rasty of academic misconduct, and thus was "inconsequential." *See* Pet. 21-22. But that was the *district court's* reasoning, Pet. 21-22; Pet. App. 59a; the Fifth Circuit simply held that an investigation did not qualify as an ultimate employment decision, Pet. App. 2a. That Petitioners are reaching back to the district court's opinion to try to establish a conflict with a factually inapposite decision further demonstrates that this case does not warrant the Court's review. Finally, exemplifying the limited practical difference between the "ultimate employment decision" standard and the materiality/significance standard, the Fifth Circuit's opinion in this case comports with decisions from other circuits holding that internal investigations are not actionable adverse employment actions. *See, e.g.*, *Peltier v. United States*, 388 F.3d 984, 988 (CA6 2004); *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1363-64 (CAFed 2002); *Jones v. Fitzgerald*, 285 F.3d 705, 714-15 (CA8 2002); *Von Gunten*, 243 F.3d, at 869. For these reasons, Rasty's claim regarding the academic-dishonesty investigation does not present a genuine conflict warranting review.

C. The Court Has Recently Declined to Review This Question.

Underscoring the unimportance of this issue, the Court has already declined to address it this Term in another case where it was squarely presented. *Stavropoulos v. Firestone*, 361 F.3d 610 (CA11 2004), *cert. denied*, 125 S. Ct. 1850 (2005) (Question Presented: "Should this Court grant certiorari to resolve the circuit split regarding the type of employer conduct that constitutes an 'adverse employment action' in a Title VII retaliation suit under 42 U.S.C. 2000e-3(a)?"). Since the Court denied review in *Stavropoulos* in April 2005, there have been no developments in the legal landscape that have transformed this issue into one that suddenly merits the Court's review.

Indeed, the Court has recently refused to review this question even when presented through the vehicle of a Fifth Circuit decision applying that court's "ultimate employment decision" standard. Just last Term, the Court denied review in three Fifth Circuit cases squarely presenting that issue.[9] There is nothing about the Fifth

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9. *Kang v. Bd. of Supervisors of La. State. Univ.*, 75 Fed. Appx. 974 (CA5 2003) (per curiam), *cert. denied*, 541 U.S. 903 (2004) (Question Presented: "Does section 704(a) of Title VII of the 1964 Civil Rights Act, which prohibits retaliation against an employee for filing a charge with the EEOC, permit an employer to engage in retaliatory action so long as that reprisal does not constitute an 'ultimate employment decision'?"); *Vasquez v. Snow*, 75 Fed. Appx. 275 (CA5 2003) (per curiam), *cert. denied*, 541 U.S. 936 (2004) (Question Presented: "Whether a plaintiff must show an ultimate employment action rather than an adverse employment action to establish a claim for retaliation under Title VII."); *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528 (CA5 2003) (per curiam), *cert. denied*, 540 U.S. 817 (2003) (Question Presented: "Do the anti-retaliation provisions of Title VII and the Age Discrimination in Employment Act, which forbid an employer from discriminating against an employee for seeking to enforce his or her rights under Title VII and

Circuit's unpublished, non-precedential opinion in this case that makes it a more appropriate vehicle to address this question.[10] Consistent with its treatment of this unimportant issue over the last two terms, the Court should again deny review.

II. THE QUESTION WHETHER DISPROPORTIONATE PAY RAISES QUALIFY AS "ADVERSE EMPLOYMENT ACTIONS" IN A TITLE VII DISCRIMINATION CLAIM DOES NOT WARRANT REVIEW.

Petitioners also assert a conflict between the Fifth Circuit and the Eleventh Circuit as to whether disproportionate pay raises may constitute "adverse employment actions" in a Title VII discrimination claim. Pet. 27-29. But in reality, precedent from these courts is in accord on this issue, and the Fifth Circuit's non-precedential opinion in this case does not disturb that consensus.

In *Gillis v. Georgia Department of Corrections*, the Eleventh Circuit held that an employer's decision that "disentitles an employee to a raise *of any significance* is an adverse employment action under Title VII." 400 F.3d 883, 888 (CA11 2005) (emphasis added). Fifth Circuit law is similar. In *Harrington v. Harris*, the court held that certain variations in the percentage of merit pay increases among a university's faculty did not qualify as "adverse employment actions" because they "were not significant." 118 F.3d 359, 366 (CA5 1997). But, the court added, "[i]f Plaintiffs had received no merit pay increase at all or if the amount of such

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ADEA respectively, actually permit such retaliation so long as the employer's actions do not constitute an 'ultimate employment decision'?").

10. *See* Pet. App. 1a; 5TH CIR. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion." *Id.* Thus, precedent from the Eleventh Circuit and Fifth Circuit does not conflict on this point. Accordingly, to the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in discrimination cases, *see* Pet. App. 3a, it is at most a misapplication of circuit precedent that does not warrant review.

III. ALTERNATIVE GROUNDS FOR AFFIRMANCE MAKE THIS CASE AN INAPPROPRIATE CANDIDATE FOR REVIEW.

If the Court were to grant the petition, Respondents would defend the judgment below by advancing alternative grounds for affirmance raised in the Fifth Circuit briefing but not reached by that court. *See Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting that respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (explaining that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below").

Although the court of appeals's disposition pretermitted consideration of numerous other defects in Petitioners' claims, a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). Although Respondents' strong arguments for affirming the judgment would be presented for this Court's review should it grant the petition, the existence of these alternative grounds for affirmance provides yet another reason why this case is an unsuitable vehicle for review of the questions urged by Petitioners.

The Court would become mired in a detailed record and evidentiary questions regarding whether Petitioners' claims of disparate treatment were founded on comparisons with "similarly situated" persons, whether Respondents had met their burden to show legitimate, non-discriminatory reasons for their actions, whether there is a genuine issue of material fact as to pretext, and whether Burton and Marcy were entitled to qualified immunity. Indeed, the bulk of the district court's opinion was dedicated to these issues rather than the "adverse employment action" question addressed by the Fifth Circuit. *See* Pet. App. 47a-69a. Because the issues related to the definition of "adverse employment action" concern only a portion of the district court's order as applied to a discrete set of facts, this case does not merit the Court's attention.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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In The
Supreme Court of the United States

JAIME CARDENAS-GARCIA and JAHAN RASTY,

Petitioners,

v.

TEXAS TECH UNIVERSITY, THOMAS BURTON, individually and in his official capacity as Chair of the Mechanical Engineering Department at Texas Tech University; WILLIAM MARCY, individually and in his official capacity as Associate Dean and later Dean of the College of Engineering at Texas Tech University,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

This Court should grant certiorari on both questions presented. Respondents' brief in opposition confirms that the courts of appeal are in disarray regarding proper standards for actionable retaliation under § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), and actionable discrimination under § 703(a), 42 U.S.C. § 2000e-2(a).

The Fifth Circuit rejected Petitioners' retaliation claims because none of the acts at issue (lower salaries, unjustified poor performance reviews that resulted in disproportionately lower raises and salaries, and disciplinary investigations) constituted an "adverse employment action," which the Fifth Circuit requires to be an "ultimate employment decision." Pet. App. 2-3; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (CA5 1997). A majority of the courts of appeals, although at times using the same "adverse employment action" phraseology, embrace a rationale and standard for retaliation claims that is materially different than that adopted by the Fifth Circuit. There is no consensus among the courts of appeal regarding the appropriate standard for analyzing retaliation claims; the difference in legal standards is entrenched and important; and the disparity in results among the circuits from the application of the varying standards is untenable.

The Fifth Circuit also rejected Petitioners' discrimination claims, applying its strict "ultimate employment decision" test. *See* Pet. App. at 3. Yet, the Eleventh Circuit has held that "actions that affect compensation are considered adverse employment actions," specifically finding that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII." *Gillis v. Ga. Dep't of Corrections*, 400 F.3d 883, 888 (CA11 2005). The Fifth Circuit here held the opposite.

This case is an ideal vehicle for resolving these splits of authority because the Fifth Circuit decided this case solely on the "ultimate employment decision" issue; there is no alternative basis for its holding. This Court should grant certiorari to bring needed clarity to these important questions.

I. Certiorari Should Be Granted To Resolve The Circuit Conflict Regarding The Proper Standard For Actionable Retaliation.

Contrary to Respondents' assertion (BIO 5-11), courts of appeal have not converged on a test for what constitutes actionable retaliation. In attempting to paper over the deep conflict that exists, Respondents assert two arguments: 1) that the "ultimate employment decision" test is "largely the same" as that used in most other circuits and differs only in the margin between "material" and "serious" employment actions required by some circuits and "ultimate" actions required by the Fifth Circuit; and 2) that case law has changed since the Ninth Circuit adopted an expansive standard that Respondents admit conflicts with the Fifth Circuit's strict test. These attempts to downplay the conflict are not persuasive; indeed, cases cited by Respondents plainly illustrate the intractable split regarding the appropriate standard for retaliation claims.

1. At base, this is a conflict over whether discrimination and retaliation claims are subject to the same "adverse action" standard, despite difference in language between the two provisions. Pet. 23-27; Pet. App. 70. The Fifth Circuit holds discrimination and retaliation claims are subject to the same standard, requiring an "adverse employment action" that actually is an "ultimate employment decision." Pet. App. at 2. Other circuits and the EEOC do not require even an adverse employment action, and certainly not an ultimate employment decision. *See, e.g., Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745 (CA7 2002) (Posner, J.) ("We do not mean to suggest . . . that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not.");[1] *Ray v. Henderson*, 217

[1] Another opinion by Judge Posner, *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (CA7 2002), uses adverse employment action language. Yet, the Seventh Circuit reads *Herrnreiter* as limiting *Stone*. *See Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1031, n.4 (CA7 2004) (noting *Herrnreiter* was decided post-*Stone* and "retaliation claims need not always involve an adverse action directly related to *employment*, just an adverse

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F.3d 1234, 1240-43 (CA9 2000) (adopting EEOC standard and "hold[ing] that an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity"); *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8, at 14 (May 1998) (opining that the retaliation provision "set[s] no qualifiers on the term 'to discriminate,' and therefore prohibit[s] *any* discrimination that is reasonably likely to deter protected activity."); *see also Noviello v. City of Boston*, 398 F.3d 76, 88-90 (CA1 2005) (deferring to EEOC standard when recognizing retaliatory harassment claim); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996) (rejecting view that retaliation claim must be based on "formal practices linked to an existing employer/employee relationship"); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (CADC 1991) (retaliation is not limited "only to acts of retaliation that take the form of cognizable employment actions").[2]

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action by an employer of some kind, depending on the facts") (emphasis in original). Thus, Respondents' reliance on *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307 (CA7 June 15, 2005) is misplaced because it cited a pre-*Herrnreiter* case, *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (CA7 2002), which in turn relied on *Stone*. *Stone* is no longer good law. *Williams*, 361 F.3d at 1031, n.4.

Reliance on *Markel v. Bd. of Regents of the Univ. of Wis. Sys.*, 276 F.3d 906 (CA7 2002), and *Graube v. Lau Indus.*, 257 F.3d 723 (CA7 2001), also is misplaced as both concerned discrimination not retaliation claims. Standards for discrimination and retaliation claims should differ. *See Johnson v. Milwaukee Sch. of Eng'g*, 258 F. Supp. 2d 896, 905-06 (E.D. Wis. 2003) (citing *Herrnreiter* and *Ray*, holding "[a] Title VII discrimination plaintiff must establish an adverse employment action. However, the same is not true in a retaliation case.").

[2] The split also results from confusion regarding the affect of the definition of "tangible employment action" in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). *Ellerth* concerned employer liability for sexual harassment. 524 U.S. at 761 (stating that the "tangible employment action" definition was "for resolution of the vicarious liability issue . . ."); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998) (holding affirmative defense is available "[w]hen no tangible employment action is taken"). Yet some courts have imported the "tangible employment action" definition into all Title VII claims. *See, e.g., White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795-800 and n.1 (CA6 2004). Others have taken

(Continued on following page)

Unlike the Fifth Circuit's categorical, "laundry list" approach, these circuits and the EEOC focus not on the *type* of employment action at issue, but upon the *retaliatory motive* and the *effects* on the employee, which necessarily requires a case-by-case approach. *See* Joan M. Savage, *Note: Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 216-17 (2004) (noting the above circuits "employ a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action"); *see also Smith v. Sec. of Navy*, 659 F.2d 1113, 1119-20 and n.56 (CADC 1981).

Yet, under the Fifth Circuit's strict test, the court categorizes actions as "ultimate" or not, with only the former supporting a claim. As a result, as shown in this case, important questions of motive and cumulative effect are dismissed by the analysis. The chill on an employee's willingness to oppose discrimination is not considered, which can emasculate effective enforcement of Title VII . Pet. at 19-20.

Moreover, even circuits that require "adverse employment action" nonetheless have explicitly rejected the Fifth Circuit's strict test. *See, e.g., White*, 364 F.3d at 795-800; *id.* at 808-17 (Clay, J., concurring); *see also* BIO at 12, n.6 (citing courts that have rejected Fifth Circuit's categorical approach and instead decide question on case-by-case basis).

In sum, the circuits have splintered, and this Court should grant certiorari in this case to resolve the confusion. *See* Savage, *Note: Adopting the EEOC Deterrence Approach*, 46 B.C. L. REV. at 230-38.

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the correct view that the "tangible employment action" definition should not be incorporated into all Title VII claims, and specifically not into retaliation claims. *Ray*, 217 F.3d at 1242, n.5 (rejecting argument that *Ellerth* sets standard for retaliation claims); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031-32 (CA10 2004) (same and noting *Ellerth* does not set standard for discrimination claims). Even if *Elleth*'s "tangible employment action" standard applies to retaliation claims, it conflicts with the Fifth Circuit's ultimate employment decision test. Pet. at 25-6.

2. The circuit split continues. Respondents acknowledge the split, but posit that the conflict is not as entrenched as *Ray* states, (BIO 7-10), and that the cases *Ray* relies upon are "outdated or simply wrong." *Id.* at 8. Yet, cases decided since *Ray* clearly demonstrate that the circuits remain deeply divided and show that the Ninth Circuit is not alone in adopting the EEOC's position.

For example, Respondents argue that the First Circuit in *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 22-27 (CA1 2002), moved away from an expansive retaliation standard articulated in *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (CA1 1994) (per curiam), which was cited approvingly in *Ray*. BIO at 8. Respondents assert that *Marrero* rejected a retaliatory harassment claim because it did not meet a "materially adverse" employment action standard. Yet, Respondents overlook that the First Circuit held this year that retaliatory harassment is actionable. *Noviello*, 398 F.3d at 76, 88-90. In so holding, the First Circuit recognized the circuit split and deferred to the EEOC standard adopted in *Ray*. *Id.* at 90.

Respondents next mistakenly argue that the Seventh Circuit has distanced itself from the broad language in *Knox v. State*, 93 F.3d 1327, 1334 (CA7 1996), which was cited approvingly in *Ray*. Rather, as noted by Judge Posner, speaking for the Seventh Circuit in *Herrnreiter*:

> We do not mean to suggest . . . that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605-06 (7th Cir. 1999); *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001); *Passer v. American Chemical Society*, 935 F.2d 322, 331-32 (D.C. Cir. 1991); *EEOC Compliance Manual* § 8, P 8008 (1998) (directive No. 915.003); see also *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 891-92 (7th Cir. 1996). Some cases reach this conclusion by interpreting "adverse employment action" in the retaliation context as not requiring an actual *employment* action; an example is *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996), where the retaliation took the form of preferring charges of theft and forgery against an employee

> who had filed a charge of discrimination. See also *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).... We left open in [another] case the question whether retaliation in other forms was actionable under Title VII [or whether retaliation must take the form of an adverse job action]. The cases cited earlier in this paragraph have now resolved the issue by holding that the provision is not so confined.

Ibid., 315 F.3d at 745-46 (emphasis in original); *see also Firestine v. Parkview Health Sys.*, 388 F.3d 229, 235 (CA7 2004) (retaliation is not limited to adverse job action). By citing the EEOC, *Ray*, *Passer* and *Berry* as stating the correct retaliation standard, the Seventh Circuit has placed itself solidly in line with *Ray*.

Finally, *Berry* articulated a broad retaliation test that is in line with *Ray*, but Respondents assert that the Tenth Circuit has since retreated. BIO at 9. Yet, just a year ago, the Tenth Circuit specifically held that "we have not abandoned the [adverse action] definition we used in *Berry* . . . we have continued to liberally define the term 'adverse employment action' and take a case-by-case approach." *Hillig*, 381 F.3d at 1031-33.

In sum, rather than converging on the Fifth Circuit's narrow test, other courts of appeals are adhering to a more expansive view of what constitutes actionable retaliation.

3. This split over the rationale and standard is not merely a difference in semantics; application of the varying tests is leading to divergent results. *See* Savage, *Note: Adopting the EEOC Deterrence Approach*, 46 B.C. L. REV. at 238. Had Petitioners worked in other circuits they would have had actionable retaliation claims, but because they worked in the Fifth Circuit, they were adjudged to have no claims.

Contrary to Respondents' characterization (BIO at 13-14), Petitioners not only claim that performance evaluations standing alone are actionable, but also claim that the poor performance reviews resulted in a lower raise when compared to similarly-situated colleagues and that the cumulative effect of the actions at issue constituted actionable retaliation. *See* Pet. at 4, 7. Indeed, Petitioner Cardenas-Garcia's performance review specifically criticizes his protected activity, and this

retaliatory review of his performance directly resulted in a reduced raise. *See* Pet. at 4.

Respondents' own authority supports finding an actionable retaliation claim. *See Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (CA1 1998) (noting retaliation "encompasses a variety of adverse employment actions, including ... unwarranted negative job evaluations"); *LaCroix v. Sears, Roebuck & Co.*, 240 F.3d 688, 691-92 (CA8 2001) (noting negative review would be actionable where used as a basis to detrimentally alter terms or conditions of employment); *Lyons v. England*, 307 F.3d 1092, 1118 (CA9 2002) (implying that performance evaluation that gives rise to further negative employment action would violate Title VII); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (CA9 1987) (holding that "transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under [Title VII's] retaliation provision"); *see also* Pet. at 20-22.[3]

Respondents' cases also confirm that the retaliatory investigation into Petitioner Rasty's alleged academic dishonesty and interference with his research, Pet. at 5-7, would be actionable outside the Fifth Circuit. *See also* Pet. at 22. For example, in *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1363-64 (CAFed. 2002), the Federal Circuit cited *Berry* favorably for the proposition

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[3] The case at bar is not merely misapplication of circuit precedent. BIO at 14, and n.8. First, *Felton v. Polles*, 315 F.3d 470, 488 (CA5 2002), did not suggest that a poor performance evaluation could be actionable if it directly affected compensation. Rather the court *assumed* that *postponing a raise* constituted actionable discrimination. Yet, the Fifth Circuit in this case held that a negative performance review, even if enacted with retaliatory motive and even though it resulted in a reduced raise, does *not* constitute an "ultimate employment action." Pet. App. at 2. Second, their reliance on *Harrington v. Harris*, 118 F.3d 359, 366 (CA5 1997), is misplaced, as discussed *supra* at 9-10. Finally, even if discrimination and retaliation cases should be analyzed under the same standards (and considering the pay raise issue alone), the reduced raises Petitioners received as a direct result of their discriminatory/retaliatory performance reviews is actionable in the Eleventh Circuit. *See Gillis*, 400 F.3d at 888 (any decision that "disentitles an employee to a raise of any significance is an adverse employment action").